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Published in:
Journal For European Environmental & Planning Law

DOI:
[10.1163/18760104-01702002](https://doi.org/10.1163/18760104-01702002)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2020

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Squintani, L. (2020). Addressing the (Lack of) Effectiveness of Environmental Law and the Gap between Law in the Books and Law in Action. *Journal For European Environmental & Planning Law*, 17(2), 133-135. <https://doi.org/10.1163/18760104-01702002>

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Editorial Note

Addressing the (Lack of) Effectiveness of Environmental Law and the Gap between Law in the Books and Law in Action

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In this second issue of this volume we present a series of contributions addressing two *ever green* topics, those of designing effective legal frameworks for protecting the environment and of addressing the gap between law in the books and law in action.

First, *Charlotte Streck*, *Moritz von Unger* and *Sandra Greiner's* account of the latest Climate Change COP 25 meeting in Madrid underlies the failure by States to agree upon a strengthening of the international agreements concerning the action to mitigate climate change. Once again, despite the importance of adopting a new agreement, States could only agree upon continuing searching for an agreement at the Conference of the Parties in 2020. This outcome should not come as a surprise. Governments failure to adopt effective policies to fight against climate change can be witnessed also at national level. In the Netherlands, the *Urgenda* case reached its final stage on 20 December 2020, thanks to the judgment of the Dutch Supreme Court confirming the outcome of the first instance and appeal judgments, thus ordering the State to do more.¹ As also

1 Dutch Supreme Court, *Urgenda v The Netherlands*, ECLI:NL:HR:2019:2006. This judgment will be analysed in the next issue of this journal. For an account of the first instance court judgment see in this journal, in particular, L. Bergkamp, A Dutch Court's 'Revolutionary' Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science, *JEEPL* 2015 12(3-4), 241-263; A.S. Tabau and C. Courmil, New Perspectives for Climate Justice: District Court of The Hague, 24 June 2015, *Urgenda* Foundation versus the Netherlands, *JEEPL* 2015 12(3-4), 221-240. See also for a more general discussion on climate change, human rights and judicial protection in this journal, L. Krämer, Climate Change, Human Rights and Access to Justice, *JEEPL* 2019 16(1), 21-34.

underlined by Streck, von Unger and Greiner, and written in this journal in 2018,² the fact that the judiciary has to deliver judgments based on tort law to influence government policies should not only be seen as a chance in terms of public interest litigation, but also as a warning for the inability of public law to address fundamental societal challenges. Such a development places a lot of pressure on the judiciary. Judiciary which might not always be best placed to review public law shortcomings. Tort law knows its limitations,³ as also proven by the many cases in which tort law based judgments did not end with an order towards the government to take actions to protect the environment, both in the Netherlands, as regards air quality law,⁴ and in other countries as regards climate change action.⁵ More generally, as evidenced by a recent stream of manuscripts, the judiciary is not always well equipped to deal with the complexity of environmental cases, given the intrinsic technical nature of such cases.⁶

- 2 L. Squintani, Tort-Law based Environmental Litigation: A Victory or Warning?, *JEEPL* 2018 15(3-4), 277-280.
- 3 P. Gillaerts, Instrumentalisation of Tort Law: Widespread yet Fundamentally Limited, *Utrecht Law Review* 2019 15(3), 27-43.
- 4 L. Squintani & E.J.H. Plambeck, Judicial Protection against Plans and Programmes Affecting the Environment: A Backdoor Solution to Get an Answer from Luxembourg, *JEEPL*, 2016 13(3-4), 294-324.
- 5 See e.g. the recent account of climate law cases in J. Jendroška, L. Squintani & M. Reese, 'The courts as guardians of the environment – New developments in access to justice and environmental litigation', *ICLG to Environmental & Climate Change Law*, 2020, 6-13 with reference to case law from Germany, Ireland and the UK. See also in this journal, Bernhard W. Wegener, Urgenda – World Rescue by Court Order? The "Climate Justice"-Movement Tests the Limits of Legal Protection, *JEEPL* 2019 16(2), 125-147.
- 6 Manuscripts highlighting the shortcomings and possible solutions, see M. Eliantonio, The Impact of EU Law on Access to Scientific Knowledge and the Standard of Review in National Environmental Litigation: A Story of Moving Targets and Vague Guidance', *EEELR* 2018, 115; T Paloniitty and M Eliantonio, Scientific Knowledge in Environmental Judicial Review: Safeguarding Effective Judicial Protection in the EU Member States?, *EEELR* 2018 27, 108. T Paloniitty and S Kangasmaa, Securing Scientific Understanding: Expert Judges in Finnish Environmental Administrative Judicial Review, *EEELR* 2018 27, 125; C Backes, Organizing Technical Knowledge in Environmental and Planning Law Disputes in the Netherlands – The Foundation of Independent Court Experts in Environmental and Planning Law, *EEELR* 2018 27, 143; F Grashof, The "You Know Better" Dilemma of Administrative Judges in Environmental Matters – A Note on the German Legal Context, *EEELR* 2018 27, 151; R Caranta, Still Searching for a Reliable Script: Access to Scientific Knowledge in Environmental Litigation in Italy, *EEELR* 2018 27, 158; and M Bar, Scientific Knowledge in Environmental Litigation before Polish Administrative Courts: A Problem of Compliance with EU Law?, *EEELR* 2018 27, 169. See also J Darpö, Understanding the Nuts and Bolts: Scientific and Technical Knowledge in Environmental Litigation: National Solutions, EU Requirements and Current Challenges, in L Squintani et al. (eds), *Managing Facts and Feelings in Environmental Governance*, Edward

The importance of equipping enforcement and judicial bodies with the rights tools emerges also from the contribution of *Farah Bouquelle* and *Luc Lavrysen* in this issue. This contribution is one of the few scientific publications focusing on the legal aspects of the fight against trading in endangered species. Its analysis of the functioning of the enforcement and judiciary system in Belgium in this field concludes with an enumeration of possible solutions for improving the functioning of the system, which could also serve as a source of inspiration for discussions about the improvement of enforcement and judiciary systems in other countries and other areas of environmental law.

The need for improving the effectiveness of environmental law in practice emerges also from the contribution of *Anne Vanhellemont* in this issue. Her study of the reporting obligations under a selection of EU environmental measures brings forward the fragility of such regulatory framework and makes proposals for improvements. Improvements in the reporting practice would benefit the quality of environmental information which, besides improving societal discussions, would arguably also benefit the functioning of enforcement and judiciary systems by providing enforcement and judiciary bodies with clearer and more reliable data about the status of the environment and the effectiveness of actions aiming at improving it.

As suggested by *Kendro Pedrosa's* contribution in this issue of JEEPL, the Court of Justice of the European Union is aware of the importance of ensuring that Member States provide clear and reliable data about the status of the environment and the effectiveness of actions aiming at improving it. His contribution focuses on the *Craeynest and others* judgment in the field of air quality law.⁷ His analysis shows how the Court in this judgment limits States freedom about how to assess ambient air quality. It also discusses the approach followed by the Court about the powers that national courts should have to review Member States choices in this field of environmental law.

All in all, the contributions in this issue of JEEPL greatly contribute the academic and societal discussions about the importance of designing effective environmental law and addressing the gap between law in the books and law in action. I wish the reader a great pleasure in reading these contributions.

Elgar 2019; M. Schultz, Scientific evidence in Swedish courts: the use of technical judges for better integration of scientific data in environmental decision-making, in L. Squintani et al. (eds.), *Managing Fact and Feelings in Environmental Governance*, Edward Elgar 2019, pp. 118–135; M. Wright, Scientific facts and litigants' feelings: practical innovations from the Vermont Environmental Court and other jurisdictions, in L. Squintani et al. (eds.), *Managing Fact and Feelings in Environmental Governance*, Edward Elgar 2019, 103–117.

7 Reported in L. Squintani, Case Law of the Court of Justice of the European Union and the General Court, Reported Period 14.02.2019–01.07.2019, *JEEPL* 2019 16(4), 407–425.